Office - Supreme Court, U.S.
FILED
MAR 22 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-558

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

IRVING INDEPENDENT SCHOOL DISTRICT,
Petitioner

v.

HENRI AND MARY TATRO, INDIVIDUALLY AND AS NEXT FRIEND OF AMBER TATRO, A MINOR,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICI CURIAE

THE SPINA BIFIDA ASSOCIATION OF AMERICA, THE EPILEPSY FOUNDATION OF AMERICA, THE NATIONAL EASTER SEAL SOCIETY, THE AMERICAN COALITION OF CITIZENS WITH DISABILITIES, THE AMERICAN COUNCIL OF THE BLIND, THE AFFILIATED LEADERSHIP LEAGUE OF AND FOR THE BLIND, THE ASSOCIATION OF CHILDREN AND ADULTS WITH LEARNING DISABILITIES, THE NATIONAL ASSOCIATION OF THE DEAF, THE INTERNATIONAL ASSOCIATION OF PARENTS OF THE DEAF, UNITED CEREBRAL PALSY ASSOCIATION, INC., THE DOWN'S SYNDROME CONGRESS, THE NATIONAL MENTAL HEALTH ASSOCIATION, THE NATIONAL SPINAL CORD INJURY ASSOCIATION, THE NATIONAL TUBEROUS SCLEROSIS ASSOCIATION, INC., THE DEVELOPMENTAL DISABILITIES ADVOCACY NETWORK, THE PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS, THE PENNSYLVANIA ASSOCIATION FOR CHILDREN AND ADULTS WITH LEARNING DISABILITIES, UNITED CEREBRAL PALSY OF NEW YORK CITY, THE AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, THE CENTER ON HUMAN POLICY, AND THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF AFFIRMANCE

Janet F. Stotland
EDUCATION LAW CENTER, INC.
Suite 2100
225 South 15th Street
Philadelphia, PA 19102
(215) 732-6655
Counsel for Amici Curiae
Counsel of Record

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interest of Amici Curiae	1
Statement of the Case	7
Summary of Argument	9
Argument	10
I. Amber is Entitled to CIC Services Under the Education of the Handicapped Act, as Amended	10
A. The Education of the Handicapped Act, as Amended, Was Intended to End the Exclusion of Handicapped Children from Public Education Programs and to Guarantee Them Special Education and Related Services in the Least Restrictive Environment	10
B. Amber is Entitled to Receive CIC as a "Related Service"	12
1. CIC is a Supportive Service Needed to Assist Amber to Benefit from Her Special Education Program	14
2. CIC is not a Medical Service	15
C. The "Mainstreaming" Provision of the EAHCA, 20 U.S.C. Section 1412(5)(B), Requires that CIC Services Be Provided to Amber	19
II. Amber Is Entitled to CIC Services from the District Under Section 504 of the Rehabilitation Act of 1973	21
Conclusion	27

TABLE OF AUTHORITIES

Cases: Page

Board of Education of Hendrick Hudson School District v. Rowley, 458 U.S. 176 (1982) . *passim*

Department of Education, State of Hawaii v. Katherine D., No. 82-4096, slip op. (9th Cir. Nov. 7, 1983) 13, 21

Dopico v. Goldschmidt, 687 F.2d 644 (2d Cir. 1982) 23, 24

Georgia Association for Retarded Citizens v. McDaniel, 716 F.2d 1565 (11th Cir. 1983) .. 27

Guardians Association v. Civil Service Commission of the City of New York, ____ U.S. ____, 103 S.Ct. 3221 (1983) 16

Hairston v. Drosick, 423 F. Supp. 180 (S.D. W.Va. 1976) 7, 12, 20, 21

Hymes v. Harnett County Board of Education, 664 F.2d 410 (4th Cir. 1981) 13

Kruelle v. New Castle County School District, 642 F.2d 687 (3d Cir. 1981) 11

Lau v. Nichols, 414 U.S. 563 (1974) 24

Maine v. Thiboutot, 448 U.S. 1 (1980) 19

Majors v. Housing Authority of City of DeKalb, Ga., 652 F.2d 454 (5th Cir. 1981) 23, 24

Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972) 10

New York State ARC v. Carey, 612 F.2d 644 (2d Cir. 1979) 26

North Dakota v. United States, ____ U.S. ____, 103 S.Ct. 1095 (1983) 13

TABLE OF AUTHORITIES — *(Continued)*

Cases: Page

PARC v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972) 5, 10

Prewitt v. United States Postal Service, 662 F.2d 292 (5th Cir. 1981) 23, 24

Richards v. United States, 369 U.S. 1 (1962) 21

Southeastern Community College v. Davis, 442 U.S. 397 (1979) 22, 23, 24, 25

Springdale School District v. Grace, 693 F.2d 41 (8th Cir. 1982), *cert. den.* ____U.S. ____, 103 S.Ct. 2086 (1983) 20

Strathie v. Department of Transportation, 716 F.2d 227 (3d Cir. 1983) 22, 24, 26

Tatro v. State of Texas, 481 F. Supp. 1224 (N.D. Tex. 1979) (*Tatro* I) 14

Tatro v. State of Texas, 516 F. Supp. 968 (N.D. Tex. 1981) (*Tatro* III) 7, 8, 15, 17, 25

Tatro v. State of Texas, 625 F.2d 557 (5th Cir. 1980) (*Tatro* II) 12, 13, 14, 21

Tatro v. State of Texas, 703 F.2d 823 (5th Cir. 1983) (*Tatro* IV) 7, 12, 17, 22

Tokarcik v. Forest Hills School District, No. 79-338, slip op. (W.D. Pa. Oct. 31, 1980), *aff'd* 662 F.2d 443 (3d Cir. 1981), *cert. den.*, 102 S.Ct. 3508 (1982) 7, 12, 13, 16, 20, 25

Zenith Radio Corp. v. United States, 437 U.S. 443 (1978) 16

TABLE OF AUTHORITIES — *(Continued)*

Statutes and Regulations: Page

Education of the Handicapped Act, as amended by the Education for All Handicapped Children Act of 1975, 20 U.S.C. Sections 1401 *et seq.* . *passim*

20 U.S.C. 1401(1) 11, 12, 18

20 U.S.C. 1401(16) 11

20 U.S.C. 1401(17) 9, 11, 14, 16, 18

20 U.S.C. 1412(2)(C) 11

20 U.S.C. 1412(3) 11

20 U.S.C. 1412(5)(B) 9, 12, 19, 20

20 U.S.C. 1413(a)(3) 20

20 U.S.C. 1414(a)(1)(C)(iv) 19

20 U.S.C. 1431-1436 20

Rehabilitation Act of 1973, Section 504, 29 U.S.C. Section 794 ..... 1, 8, 9, 21-26

29 U.S.C. 706(6) 22, 26

34 C.F.R. (1983):

104.3(j)(2)(iii) 22

104.3(k)(2) 23

104.4(b) 23

104.4(b)(2) 26

Part 104, Appendix A, No. 6 24

300.13 (comment) 12

300.13(b)(4) 17

300.13(b)(10) 17

TABLE OF AUTHORITIES — *(Continued)*

Legislative Materials: Page

121 Cong. Rec. (1975)

19483 20

19484 20

19485 20

19505 20

23703 20

25539 20

S. Rep. No. 93-1297, 93rd Cong., 2nd Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373 ..... 22, 26

S. Rep. No. 94-168, 94th Cong. 1st Sess. (1975), *reprinted in* 1975 U.S. Code Cong. & Ad. News 1425 27

S. Rep. No. 94-455, 94th Cong. 1st Sess. (1975), *reprinted in* 1975 U.S. Code Cong. & Ad. News 1480 20

Other Authorities:

Goldstein, Arkell, Ashcroft, Hurley & Lilly, "Schools," in II ISSUES IN CLASSIFICATION OF CHILDREN 4 (N. Hobbs ed. 1975) .. 10, 16

Note, "Accommodating the Handicapped: Rehabilitating Section 504 After *Southeastern*," 80 Colum. L. Rev. 171 (1980) 26

INTEREST OF AMICI CURIAE

Pursuant to Rule 36 of the Rules of the Supreme Court,[1] *amici* Spina Bifida Association of America and 20 other non-profit organziations file this brief in support of respondents Henri, Mary and Amber Tatro.

Amici include among their members children with, *inter alia*, cerebral palsy, epilepsy, spina bifida, learning disabilities, visual and hearing impairments, the families of these children and others concerned with their welfare. Physically and mentally disabled youngsters have historically been excluded from their fair share of public education services and from the societal benefits those services make possible. Children such as these have often lived in forced physical and social isolation — hidden rather than helped by this society.

Recognizing the human and economic costs of this discrimination, Congress passed the Education for All Handicapped Children Act of 1975 (EAHCA) and Section 504 of the Rehabilitation Act of 1973 (Section 504). The EAHCA compels recipient states to open their public schools to the handicapped and to provide them with meaningful education programs; Section 504 prohibits school districts and other recipients of federal financial assistance from engaging in discriminatory or stigmatizing practices with respect to the disabled.

This case presents precisely the type of exclusion and precisely the type of stigmatizing treatment which these laws prohibit, and thus its importance to respondent Amber Tatro and to *amici* is obvious. It is because of this acute concern that *amici* seek this opportunity to be heard and to urge the affirmance of the decision of the Court below.

Amici herein are:

(1) *Spina Bifida Association of America* (SBAA), organized in 1972, seeks to increase public

1. Letters of Consent to the filing of this brief have been lodged with the Clerk of the Court.

awareness and understanding of spina bifida. SBAA's membership consists of adults and youngsters with this birth defect, their parents and other members of the community involved with the care of or provision of services to individuals with spina bifida. The Association conducts national conferences with seminars on scientific, social, medical and education matters, and provides support to individuals and families through a network of chapters;

(2) *The Epilepsy Foundation of America* (EFA) is the only national, charitable, non-profit voluntary agency in the United States specifically dedicated to the welfare of children and adults with epilepsy. EFA is committed to the prevention and control of epilepsy and to improving the lives of the approximately two million Americans with the condition;

(3) *The National Easter Seal Society* is the country's oldest and largest non-profit health care agency providing direct services to children and adults with disabilities due to any cause. Throughout its 60 year history, the Easter Seal Society has provided services focusing not only on individuals with disabilities, but also addressing the removal of barriers that prohibit the disabled from entering the mainstream of their communities;

(4) *The American Coalition of Citizens with Disabilities* (ACCD) is an association composed of national, state and local organizations of and for disabled persons. ACCD represents some eight million disabled individuals, parents of disabled persons and service providers, and is the only national coalition of disability groups of all types;

(5) *The American Council of the Blind* (ACB) is the nation's largest non-profit membership organization of blind and visually impaired individuals. ACB seeks to insure that blind people, incuding blind school-aged youngsters, have the opportunity to participate fully in all aspects of American life;

(6) *The Affiliated Leadership League of and for the Blind of America* (ALLB) is a non-profit organization consisting of eighty national, state and local organizations of and for blind people, including almost all of the national organizations of and for blind people. The ALLB is dedicated to advancing the rights of and obtaining services for blind people;

(7) *The Association of Children and Adults with Learning Disabilities* (ACLD) is a voluntary association with over 60,000 members in 800 chapters throughout the country. Membership is composed of learning disabled individuals, parents of the learning disabled and professionals who work with learning disabled people. ACLD's paramount purpose is promoting the education and welfare of those with learning disabilities;

(8) *The National Association of the Deaf* (NAD) is a national non-profit organization of approximately 18,000 members who are hearing-impaired adults, parents of hearing-impaired children and professionals who serve deaf individuals. The NAD is the largest consumer organization of hearing impaired people in the United States;

(9) *The International Association of Parents of the Deaf* (IAPD) is an international organization composed primarily of parents of deaf individuals. The purpose of IAPD is to provide information and support to families with children who are deaf or hard of hearing;

(10) *United Cerebral Palsy Association, Inc.* (UCPA) is a national voluntary health organization formed in 1949. UCPA conducts public and professional educational and advocacy programs, supports research in cerebral palsy and, in conjunction with its 225 affiliates, provides direct services to persons with cerebral palsy, members of their families and those with similar service needs;

(11) *The Down's Syndrome Congress* is a national service organization of over 550 local parent groups, representing a constituency of a quarter-million families having at least one person in the family with Down's Syndrome. The primary purposes of the Congress are to increase public awareness of Down's Syndrome and to provide support to parents and families of Down's Syndrome individuals;

(12) *The National Mental Health Association* is a voluntary organization dedicated to the promotion of mental health, the prevention of mental illness and the improved care and treatment of persons with mental illness. The 650 Mental Health Association local chapters and state divisions and its more than one million citizen volunteers work toward these goals through a wide range of activities in social action, education, advocacy and public information;

(13) *The National Spinal Cord Injury Association* (NSCIA) is a non-profit voluntary health organization committed to a comprehensive approach to the problem of spinal cord injury. Activities include research toward a cure for the paralysis resulting from spinal cord injury and services to persons who have sustained an injury and to their families. The NSCIA is committed to the proper care and independence of its members;

(14) *The National Tuberous Sclerosis Association, Inc.* (NTSA) is a voluntary non-profit organization established to provide a better quality of life for those afflicted with tuberous sclerosis and to encourage research and education which will prevent future generations from experiencing the tragedies of this neurological disease. NTSA was founded in 1974 and currently has a membership of 1500 families;

(15) *The Developmental Disabilities Advocacy Network of Pennsylvania* (DDAN) is an independent, non-profit agency which has been designated by the Governor of Pennsylvania as the Commonwealth's Protection and Advocacy System. DDAN is responsible for providing protection and advocacy services to Pennsylvania's developmentally disabled children and adults;

(16) *The Pennsylvania Association for Retarded Citizens* (PARC) is an organization of approximately 14,000 persons, most of whom are parents of retarded individuals. PARC has long been concerned with the educational services available to retarded children and brought the landmark case concerning the right of such children to attend public school, *PARC v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972);

(17) *The Pennsylvania Association for Children and Adults with Learning Disabilities* (PACLD), founded in 1967, is an organization of approximately 800 persons, most of whom are parents of learning disabled children. PACLD assists parents in understanding their children's rights to special education services and obtaining the services to which they are entitled;

(18) *United Cerebral Palsy of New York City, Inc.* (UCP-NYC) is a non-profit corporation formed to advance the interests of cerebral palsied individuals in New York. UCP-NYC provides direct services to children and adults and conducts public and professional education and advocacy programs;

(19) *American Association on Mental Deficiency* (AAMD) is a multidisciplinary, scientific organization consisting of nearly 10,000 professional members. With 17 divisions and 9 regional and 35 state chapters, the AAMD has provided long-stand-

ing national and international leadership in the field of mental retardation;

(20) *The Center on Human Policy* (CHP) is a research and policy institute of the Division of Special Education and Rehabilitation at Syracuse University. CHP was founded in 1971 for the study and promotion of open settings for people with disabilities;

(21) *The American Civil Liberties Union* (ACLU) is a nationwide, non-partisan organization of over 250,000 members dedicated to protecting the fundamental rights of the people of the United States. Among those fundamental rights are the right to be free from discrimination based on handicap and the right to a public education.

STATEMENT OF THE CASE

Seven-year-old Amber Tatro was born with spina bifida, a condition which has left her with orthopedic and speech impairments and, most importantly for this case, a neurogenic bladder — that is, she has no sensation of bladder fullness and cannot void voluntarily. Spina bifida has no impact on Amber's intelligence, however, and she currently receives the bulk of her education in a classroom with non-handicapped children. *Tatro v. State of Texas*, 703 F.2d 823, 825 (5th Cir. 1983) (*Tatro* IV); *Tatro v. State of Texas*, 516 F. Supp. 968, 970-971, 974 (N.D. Tex. 1981) (*Tatro* III); Respondents' Brief.

The procedure which is used to deal with Amber's neurogenic bladder is called Clean Intermittent Catheterization (CIC). At regular intervals, a tube is used to release the urine collected in Amber's bladder; neither a special environment nor sterile equipment is needed. CIC takes only a few minutes, and a person with no technical knowledge can be taught to perform it in less than an hour. Amber has been safely catheterized by her parents, her babysitter, her teachers and teachers' aides and her teenage brother. Soon, Amber will be able to catheterize herself. *Tatro* III at 970-971 n. 1, 974.

CIC has dramatically changed and greatly simplified the lives of many children with spina bifida. With the use of this safe, simple and inexpensive aid to toileting, children who once would have died in early childhood or led restricted and segregated lives now have normal lifespans and work, play and attend school with their non-handicapped peers. *Tatro* III at 974; *Tokarcik v. Forest Hills School District*, No. 79-338, slip op. at 4-5 (W.D. Pa. Oct. 31, 1980), *aff'd*, 662 F.2d 443 (3d Cir. 1981), *cert. den.*, 102 S.Ct. 3508 (1982); see, *Hairston v. Drosick*, 423 F. Supp. 180, 182-183 (S.D. W.Va. 1976).

In 1979, when Amber was old enough to attend school, her parents approached Petitioner Irving Independent School District ("the District") for educational services. The District evaluated Amber, developed an Individualized Education Program (IEP) for her and recommended that she be placed in the District's Early Childhood Development Classes. However, the District refused to include in that IEP a commitment to provide CIC. *Tatro* III at 971.

With the exception of this omission of CIC services, the Tatros agreed that the IEP and the proposed placement were appropriate for Amber. But Amber, like all other students, could attend the recommended program only if she could empty her bladder during the school day. Thus, the Tatros requested that the District's refusal to provide CIC be reviewed at an impartial due process hearing convened in accordance with the requirements of federal and state law. The Hearing Officer found in favor of the Tatros and ordered the District to provide Amber with CIC services. This decision was affirmed by the State Commissioner of Education, but was subsequently reversed by the State Board of Education. *Id.* at 971.

The Tatros then filed this action in federal court, seeking, *inter alia*, a permanent injunction ordering the District to provide CIC for Amber while she attends school. *Id.* at 971. The proceeding resulted in a decision of the United States Court of Appeals for the Fifth Circuit in favor of the Tatros under The Education of the Handicapped Act, as amended by The Education For All Handicapped Children Act of 1975, 20 U.S.C. Sections 1401 *et seq.* (EAHCA) and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794 (Section 504). That decision is the subject of the instant proceeding.

SUMMARY OF ARGUMENT

The EAHCA requires Petitioner School District to provide Amber with Clean Intermittent Catheterization (CIC) services. Amber is a handicapped child and must receive from the school district special education and those related services needed to assist her to benefit from special education. CIC is such a related service. 20 U.S.C. Section 1401(17).

Moreover, the EAHCA guarantees Amber the right to be educated with her non-handicapped peers to the maximum extent appropriate to her needs. Thus, it requires Petitioner School District to provide her with those "supplementary services" necessary to achieve this goal. With CIC, Amber can attend a regular education program; without it, she must receive her schooling at home or in a restrictive setting. Thus, CIC is also a "supplementary service" which the District must provide to Amber. 20 U.S.C. Section 1412(5)(B).

Under Section 504, recipients of federal financial assistance such as Petitioner are prohibited from discriminating against or denying the benefits of their programs to qualified handicapped persons such as Amber. Non-discrimination includes making those reasonable accommodations necessary to meet the needs of the handicapped as adequately as the needs of the non-handicapped are met. CIC is such a reasonable accommodation, and the Petitioner's refusal to provide it violates Section 504.

ARGUMENT

I. Amber is entitled to CIC Services Under the Education of the Handicapped Act, as Amended

A. The Education of the Handicapped Act, as Amended, Was Intended to End the Exclusion of Handicapped Children from Public Education Programs and to Guarantee Them Special Education and Related Services in the Least Restrictive Environment

The EAHCA is a source of substantial federal financial assistance for states that agree to comply with its funding conditions. *Board of Education of Hendrick Hudson School District v. Rowley* 458 U.S. 176, 179 (1982). This enactment, which was the culmination of years of Congressional study and concern, represented an

> ambitious federal effort to promote the education of handicapped children, and was passed in response to Congress' perception that a majority of handicapped children in the United States "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.' " H.R. Rep. No. 94-332, p. 2 (1975). *Rowley* at 179.

Congress' concerns were well-founded. Many states totally excluded disabled youngsters from their public schools. *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972); *PARC v. Commonwealth of Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972). Others denied schooling to children unable to meet certain behavioral objectives, such as toilet training.[2] Still others simply admitted the handi-

---

2. Goldstein, Arkell, Ashcroft, Hurley and Lilly, "Schools," in II ISSUES IN THE CLASSIFICATION OF CHILDREN 4, 5 (N. Hobbs ed. 1975).

capped to regular education programs, leaving the children to "fend for themselves in classrooms designed for education of their nonhandicapped peers." *Rowley* at 191.

The EAHCA was designed to end all forms of exclusion. It defines its beneficiary class broadly, including within its coverage children with all types and degrees of intellectual and physical impairment. 20 U.S.C. Sections 1401(1); 1412(2)(C) and (3). *Rowley* at 181; *Kruelle v. New Castle County School District*, 642 F.2d 687, 693 (3d Cir. 1981). Congress fully recognized that it was legislating for a highly diverse population with varied educational needs. Thus, instead of specifying the programs and services which are appropriate for all handicapped youngsters, the Act establishes a procedure by which programs and services are determined based on the individual needs of each child. *Rowley* at 202, 205.

Handicapped children are entitled to appropriate "special education" services. Special education is defined as "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child . . . . " 20 U.S.C. Section 1401(16). But physical and mental impairments can limit learning in ways that specialized instruction alone cannot overcome. It does little good, for example, to develop a special education program for a physically impaired youngster and then fail to provide the physical therapy the child needs to sit at a desk. Thus, the EAHCA also requires that each handicapped child receive "related services," those "developmental, corrective, and other supportive services . . . as may be required to assist a handicapped child to benefit from special education . . . . " 20 U.S.C. Section 1401(17). The statute lists physical and occupational therapy, recreation and a number of other examples of related services, but consistent with the need to be illustrative rather than exhaustive, Congress did not attempt to specify all possible

related services. See, Comment to regulatory definition of "Related Services," 34 C.F.R. Section 300.13 (1983).

The EAHCA also mandates that, to the maximum extent possible, handicapped youngsters attend school in regular education programs together with their non-handicapped peers. *Rowley* at 202. This right to be educated in the "mainstream" can be limited

> only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. . . . 20 U.S.C. Section 1412(5)(B).

The EAHCA, then, was designed to end the exclusion of handicapped children from public education programs; to insure that they receive individualized programs of education and related services from which they can derive meaningful educational benefit; and to prevent the unnecessary segregation of handicapped children from their non-disabled peers. *Rowley* at 179, 200-203. With these mandates in mind, we turn to the question in this case — does the EAHCA require that Amber's School District provide her with the CIC services she needs to attend her recommended education program? *Amici* contend that the answer is yes.

B. Amber is Entitled to Receive CIC as a "Related Service"

All parties concede that Amber is "handicapped," 20 U.S.C. Section 1401(1), and is entitled to the special education and related services she needs. The Court of Appeals held that CIC is a related service and ordered the District to provide it to Amber during school hours until she reaches an age at which she can self-catheterize. *Tatro v. State of Texas*, 625 F.2d 557, 564 (5th Cir. 1980) (*Tatro* II); *Tatro* IV at 831. The Court's reasoning and its conclusions are correct and are consistent with those of every other court to consider this matter. *Tokarcik, supra*, 665 F.2d at 459; *Hairston v. Drosick*,

423 F. Supp 180 (S.D. W.Va. 1976); see also, *Department of Education, State of Hawaii v. Katherine D.*, No. 82-4096, slip op. (9th Cir. Nov. 7, 1983) (handicapped child entitled to maintenance of tracheostomy tube); *Hymes v. Harnett County Board of Education*, 664 F.2d 410 (4th Cir. 1981).[3]

The statutory definition of related services is relatively straightforward. *Tokarcik, supra* at 455. Related services are

> transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education. . . . 20 U.S.C. Section 1401(17).

As the courts below noted (including the District Court in its initial opinion denying Amber services), CIC falls squarely within this definition: (1) CIC is a supportive service; (2) CIC is needed to assist Amber to benefit from her special education program; and (3) CIC is not a medical service. *Tatro* II at 562-563.[4]

---

3. Petitioner's contention that judicial review under the EAHCA is limited to insuring compliance with the state plan and other procedural safeguards was expressly rejected in *Rowley, supra*. The Court there stated:

> [I]nquiry [under 20 U.S.C. Section 1415(e)(2)] will require a court not only to satisfy itself that the State has adopted the state plan, policies, and assurances required by the Act, but also to determine that the State has created an IEP for the child in question which conforms with the requirements of Section 1401(19) [including special education and related services]. *Id.* at 206, n. 27.

4. When interpreting a statute, a court must begin with its literal language. Moreover, "absent a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *North Dakota v. United States*, ____ U.S. ____, 103 S.Ct. 1095, 1102-1103 (1983).

1. CIC is a Supportive Service Needed to Assist Amber to Benefit from Her Special Education Program

CIC is a "supportive service" for Amber:

> CIC is supportive of Amber's education in the sense that it is required at sufficiently frequent intervals that her education and CIC must proceed apace. *Tatro* II at 562, quoting from *Tatro v. State of Texas*, 481 F. Supp. 1224, 1227 (N.D. Tex. 1979) (*Tatro* I).

In the same sense, CIC is also a service Amber needs "to benefit from special education."

> Quite simply put, without the provision of CIC, Amber cannot benefit from the special education to which she is entitled, for, without CIC, she cannot be present in the classroom at all. *Tatro* II at 562.

The District and *amicus* National School Boards' Association (NSBA) argue that, since Amber requires CIC before and after, as well as during, the school day, the need for CIC does not "arise [solely] from the effort to educate" her. *Tatro* I at 1227. From this they conclude that CIC is unrelated to Amber's learning, and thus cannot be a "supportive service" under 20 U.S.C. Section 1401(17). *Id.* at 1227.

This position reflects an artificially narrow view of the educational experience. For all students, handicapped and non-handicapped alike, the school day encompasses far more than formal academic instruction. Students are, after all, children, and they often need help with the activities of daily living which take place during the school day — they must remove their coats; they must eat; they must enter into and move about the classroom; and they must use the toilet.

Surely, it is a supportive service when a teacher pushes the wheelchair of a physically impaired child from one classroom to another, even though such assistance may also be necessary during the non-school portion of the day. Surely, it is a supportive service for an

adult to open the milk carton of a youngster who is unable to do it on his or her own, even though the same task must be performed at breakfast and at dinner. In any but the most narrow and myopic reading of the phrase, such services do in fact "arise from the effort to educate" because they make education possible.

A youngster who is offered an education program to which he cannot gain physical access or which does not provide him with the support necessary for him safely to get through the school day is just as effectively excluded from school as a youngster who is offered no program at all. As the Court in *Rowley, supra,* repeatedly emphasized, a major purpose of the EAHCA is to end the exclusion of handicapped children and to provide them with "access to public education." *Id.* at 180. This clear goal would be substantially defeated if the narrow interpretation of supportive services urged by the District and NSBA were adopted.

2. CIC is not a Medical Service

CIC is a simple aid to toileting which can be performed safely and quickly in school or at home by a person with no medical training. The primary equipment needed are a small, clean tube and a bottle.[5] Most children with spina bifida and normal intelligence can per-

---

5. *Tatro* III at 970-971, n. 1. Of course, the Tatros provide even these materials. To the extent that true medical services are required in order for Amber to receive CIC, *e.g.*, the medical prescription and ongoing monitoring, these services are obtained outside the school setting and paid for by the Tatros. See, District Brief at 25-26 for list of such services. The Tatros have never requested that the District assume the "high cost of providing medical treatment" to Amber. In no conceivable sense did the decision of the Court of Appeals impose upon school districts obligations to "underwrite the massive financial obligations involved in providing all medical treatment . . . for more than eight million children. . . .," District Brief at 20, 22, nor will such a result flow from an affirmance by this Court.

form CIC on themselves beginning at approximately six to seven years of age. *Tokarcik, supra,* 665 F.2d at 458-459. A service that can be performed safely by children of such tender years is hardly one that should be labelled "medical treatment." Thus, a common sense, practical answer to the question of whether CIC is a medical service would result in an affirmance of the decision of the Court of Appeals in this case.[6]

The courts below, however, had more to rely on than their common sense — namely, the Act itself and the regulations implementing the Act. The regulatory definition of medical services is an early interpretation of the statute by the agency charged with its enforcement and, as such, it cannot be rejected "absent clear inconsistency with the face or structure of the statute, or with the unmistakable mandate of the legislative history." *Guardians Association v. Civil Service Commission of the City of New York,* ____ U.S. ____, 103 S.Ct. 3221, 3227 (1983) (opinion of White, J.); *Zenith Radio Corp. v. United States,* 437 U.S. 443, 450 (1978). As the Court below recognized, the definition is more than merely consistent with the statute. It gives proper weight to the Congressional decision to exclude genuine medical services from coverage while respecting handicapped children's broad entitlement to needed related services.

---

6. The language of the statute makes clear that the mere fact that CIC must be provided under a physician's orders does not make it a "medical service." The EAHCA expressly requires the provision of physical therapy and audiological services, notwithstanding the fact that both are almost invariably provided under physicians' prescriptions. 20 U.S.C. Section 1401(17). Moreover, with medically involved children, many activities of daily living can involve physicians' prescriptions, such as proper seating, lighting, diet or restrictions on the length or strenuousness of activities. The prescriptions do not, however, make these program modifications into "medical services." See, Goldstein, Arkell, Ashcroft, Hurley & Lilly, "Schools," in II ISSUES IN CLASSIFICATION OF CHILDREN 4, 19-20 (N. Hobbs ed. 1975).

Medical services are

> services provided by a licensed physician . . . 34 C.F.R. Section 300.13(b)(4) (1983).

Medical Services are to be distinguished from "school health services." The regulations expressly designate the latter as related services and require that they be provided.

> "School health services" means services provided by a qualified school nurse or other qualified person. 34 C.F.R. Section 300.13(b)(10) (1983).

To determine whether CIC could be provided by a "school nurse or other qualified person," the District Court turned to state law for guidance. Based on a thorough review of applicable precedents, and with the assistance of the Texas Medical Association and the Dallas County Medical Society, the District Judge concluded that CIC could legally be performed by a school nurse or by any lay person who had completed a short period of training. Having concluded that CIC can be provided by any "qualified person," the District Court held that it was a school health service, not a medical service, and that the school distict was obliged to provide it to Amber. *Tatro* III at 976. These conclusions were upheld in *Tatro* IV at 827-829.

The District and *amicus* NSBA contend that the approach of the courts below and of the regulations — which look to whether medically skilled persons are needed to perform the service — is in error. *Amicus* NSBA suggests that the applicable test should be whether the need for the service arises from the "health needs" of the child, in which case the service is "medical" and is not required, or from the child's "education needs," in which case it is a related service and is required. Acceptance of this artificial distinction would reerect precisely the type of barrier to educational opportunity that Congress enacted the EAHCA to eliminate.

As this Court repeatedly recognized in *Rowley, supra,*

> the [EAHCA] evinces a congressional intent to bring previously excluded handicapped children into the public education systems of the States and to require the States to adopt procedures which would result in individual consideration of and instruction for each child. *Id.* at 189 (emphasis in original deleted).

Thus, the Act's definition of "handicapped children" includes a wide variety of children, including, *inter alia,* children who are "health impaired . . . who *by reason thereof* require special education and related services." 20 U.S.C. Section 1401(1) (emphasis added). It is tautological that a health impaired child's need for special education and related services arises from a "health need." Nevertheless, such a child is clearly entitled to the protections of the Act.

Amicus NSBA's argument is further refuted by the express listing of physical therapy in 20 U.S.C. Section 1401(17). In the school setting, physical therapy is used to ameliorate the effects of a child's orthopedic impairment on his special education program. The need for physical therapy arises from a health need, *e.g.,* the child's physical impairment. But physical therapy is performed by a non-physician and is needed by some children to benefit from their special education programs. Thus, it is a non-medical related service, and the Act requires that it be provided. *Amicus* NSBA's suggested analysis, then, conflicts with both the spirit and the language of the EAHCA.

The District and *amicus* NSBA urge that the Court of Appeals' analysis should be reversed because Congress could not have intended the result. They argue, in effect, that Congress could not have meant what it clearly said. On the contrary,

Congress was aware of what it was doing, and the legislative history does not demonstrate that plain language was not intended. Petitioner's arguments amount to the claim that had Congress been more careful, and had it fully thought out the relationship among the various sections, it might have acted differently. That argument, however, can best be addressed to Congress. *Maine v. Thiboutot*, 448 U.S. 1, 8 (1980).

C. The "Mainstreaming" Provision of the EAHCA, 20 U.S.C. Section 1412(5)(B), Requires that CIC Services Be Provided to Amber

The EAHCA "requires participating states to educate handicapped children with non-handicapped children whenever possible." *Rowley* at 202. The statutory language is clear:

> In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:
>
> * * *
>
> The State has established . . . procedures to assure that, to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily . . . 20 U.S.C. Section 1412(5)(B). See also, 20 U.S.C. Section 1414(a)(1)(C)(iv).

This "mainstreaming" requirement dictates the affirmance of the decision of the Court of Appeals in two

ways. First, for Amber, CIC is a "supplementary service" which she requires in order to be educated in the regular classroom. Second, the mainstreaming mandate further supports the argument, see Section II(B), *supra*, that CIC is a related service.

Congress viewed the mainstreaming mandate as a key requirement of the EAHCA.[7] While it recognized that some children are so severely impaired that they require education in separate settings, Congress declared that such segregation will be tolerated only when necessitated by the child's needs, and not because of administrative convenience or other non-educational factors. *Hairston, supra*, 423 F. Supp. at 183-184. See *Springdale School District v. Grace*, 693 F.2d 41 (8th Cir. 1982), *cert. den.* ____ U.S. ____, 103 S.Ct. 2086 (1983).

Amber is entitled to receive CIC from the District because CIC is a "supplementary service" which must be provided to prevent her "removal . . . from the regular education environment." 20 U.S.C. Section 1412(5)(B); *Tokarcik, supra*, at 457. Like most children with spina bifida, Amber is intellectually normal. If CIC is provided, she can attend regular education classes. Without CIC, her practical options will be limited to more costly homebound instruction or to placement in a private

---

7. See, *e.g.*, S. Rep. 94-455, 94th Cong., 1st Sess. 30 (1975) (Conf. Rep.), *reprinted in* 1975 U.S. Code Cong. & Ad. News, 1480, 1483; 121 Cong. Rec. 19484 (1975) (Sen. Stafford); 121 Cong. Rec. 19485 (1975) (Sen. Williams); 121 Cong. Rec. 19505 (1975) (Sen. Humphrey); 121 Cong. Rec. 23703 (1975) (Rep. Brademas); 121 Cong. Rec. 25539 (1975) (Rep. Miller).

Congress also understood that the implementation of this mainstreaming mandate required dramatic changes, including the retraining of regular as well as special education personnel. This retraining had to direct itself both to the acquisition of new skills and to the eradication of old sterotypes and attitudes. The Act committed substantial federal funds for these state and local training efforts. 20 U.S.C. Sections 1413(a)(3), 1431-1436. See also, Conf. Rep., *supra*, at 40-41, *reprinted in* 1975 U.S. Code Cong. & Ad. News, *supra*, at 1484; 121 Cong. Rec. 19483 (1975) (Sen. Randolph).

school, either of which would isolate her from non-handicapped friends and peers in a setting that bears no relation to her educational needs and abilities. See, *e.g.*, *Department of Education, State of Hawaii v. Katherine D.*, *supra* (child denied services to maintain her tracheostomy tube and offered only homebound instruction); *Hairston v. Drosick*, *supra*. This is a result which Congress expressly forbade, and which this Court cannot permit.

Moreover, the mainstreaming provision of the Act reinforces the position that CIC is a related service. When interpreting the multiple provisions of a single comprehensive enactment, a court should attempt to construe the sections so that they are not in conflict with, but rather enhance, one another. See, *Richards v. United States*, 369 U.S. 1, 11 (1962). As the *Tatro* II court recognized,

> [c]onstruing the term "related services" to exclude services like CIC, necessary to keep a handicapped child in the classroom, would completely eviscerate this [mainstreaming] mandate. This we cannot do. *Id.* at 563.

II. Amber is Entitled to CIC Services from the District Under Section 504 of the Rehabilitation Act of 1973

The Court of Appeals held that Amber is entitled to receive CIC services under Section 504 of the Rehabilitation Act of 1973 as amended, 29 U.S.C. Section 794 (Section 504), because she is a qualified handicapped individual who would otherwise be excluded from participation in and denied the benefits of the District's federally assisted education program.[8] This holding is correct and should be affirmed.

---

8. The full text of Section 504 is as follows:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be sub-

The District and *amicus* NSBA contend that this Court's decision in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), dictates reversal of the decision below. In *Southeastern*, this Court held that an "otherwise qualified handicapped individual" is one who meets all of a program's eligibility requirements in spite of the handicap. *Id.* at 406. The Court also held that Section 504 does not require a recipient of federal financial assistance to undertake a fundamental alteration in the nature of its program to meet the special needs of handicapped persons. *Id.* at 411.

From these premises, the District erroneously concludes that under no circumstances does Section 504 require a recipient of federal funds to take *any* steps to accommodate the needs of the handicapped, and accordingly argues that it is not obligated by Section 504 to provide Amber with CIC services. This position is neither compelled by nor consistent with *Southeastern*. Rather, *Southeastern* recognizes that Section 504 requires a recipient to undertake simple, inexpensive accommodations when necessary to allow a qualified handicapped person the opportunity to participate in federally assisted programs. See, *Strathie v. Department of Transportation*, 716 F.2d 227, 231-232 (3d Cir.

NOTE — *(Continued)*

jected to discrimination under any program or activity receiving Federal financial assistance . . . .

It is undisputed that Amber is handicapped. 29 U.S.C. Section 706(6); 34 C.F.R. Section 104.3(j)(2)(iii) (1983). It is also clear that the District is a recipient of federal financial assistance. *Tatro* IV at 832. Moreover, there is no question that Congress intended Section 504's protections to extend to students such as Amber. S. Rep. No. 93-1297, 93d Cong. 2d Sess. 38, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373, 6388-89. See also, *id.* at 6407-6408 (explaining that one rationale for broadening the statutory definition of "handicapped individual" under Section 504 was to ensure coverage of handicapped children who might otherwise be denied admission to public school programs).

1983); *Dopico v. Goldschmidt*, 687 F.2d 644, 653 (2d Cir. 1982); *Majors v. Housing Authority of City of DeKalb, Ga.*, 652 F.2d 454, 457 (5th Cir. 1981). See also, *Prewitt v. United States Postal Service*, 662 F.2d 292, 307 n. 21 (5th Cir. 1981). The District's arbitrary refusal to take the minimum steps involved in providing CIC to Amber constitutes precisely the sort of discrimination which Section 504 prohibits.

Unlike the plaintiff in *Southeastern*, Amber is an "otherwise qualified" handicapped individual with respect to the program at issue because she meets all of the legitimate eligibility requirements for that program in spite of her handicap. Legitimate requirements for public school attendance are dramatically different from the requirements of the post-secondary nurses' training program which was the subject of *Southeastern*. Virtually all states provide that when children reach a certain age, they are eligible for public school programs, and in fact, they and their parents are usually subject to civil and criminal sanctions should they not attend. When Amber reached the age of three, she met all of Texas' legitimate eligibility requirements and was therefore an "otherwise qualified" individual with respect to the District's education program. 34 C.F.R. Section 104.3(k)(2) (1983) (similarly defining "qualified handicapped persons" as youngsters of school-age).

Section 504 requires that qualified handicapped individuals be offered aids, benefits and services on an equal basis with the non-handicapped. 34 C.F.R. Section 104.4(b) (1983). However,

> in order to meet the individual needs of handicapped persons to the same extent that the corresponding needs of non-handicapped persons are met, adjustments to regular programs or the provision of different programs may sometimes be necessary. This standard parallels the one established under title VI of Civil Rights Act of 1964 with respect

> to the provision of educational services to students whose primary language is not English. see *Lau v. Nichols*, 414 U.S. 563 (1974). 34 C.F.R. Part 104, Appendix A, No. 6 (1983) [explaining "equally effective services requirement" in 34 C.F.R. Section 104.4(b)(2)].

Accord, Southeastern, supra; Strathie, supra at 231-232; *Dopico v. Goldschmidt, supra* at 653; *Majors v. Housing Authority of City of DeKalb, Ga., supra* at 457; *Prewitt v. United States Postal Service, supra* at 307 n. 21.

The District is not meeting Amber's needs to the same extent that the corresponding needs of her non-handicapped classmates are met. Obviously, the main mission of school districts is to educate their students, and the district is offering public education programs to its other school-aged residents. By refusing to provide Amber with the simple and inexpensive accommodation of CIC, the District is for all practical purposes excluding her from the education program which it developed and recommended for her. Such exclusion violates Amber's rights under Section 504 to equal treatment.[9]

The Petitioner and *amicus* NSBA argue that Amber is not being excluded from or denied the benefits of the District's educational program, because the educational program they have offered Amber is available for her use on the same basis as it is available to youngsters who do not have her physical limitations. This position is disingenuous at best. The program offered Amber is no more available to her than is a similar program offered to a

---

9. The District is also discriminating against Amber in another way. The District, like all other school districts, routinely provides its non-handicapped students with assistance in tasks of daily living, including toileting. Amber needs the same type of assistance provided in a different manner, that is, Amber needs CIC. The refusal to provide this accommodation, thus denying her services provided to non-handicapped youngsters, also violates Section 504.

child in a wheelchair — in an inaccessible second floor classroom. Such technical and absurd positions are not consistent with and are not countenanced by the terms or the spirit of Section 504.

The District refuses to recognize that, due to tremendous medical and technological advances in the last twenty years, catheterization has progressed from a complex, technical procedure to one which imposes no undue fiscal or administrative burden of any kind. Until about 1966, a child like Amber would have been catheterized in the morning, the catheter remaining inside her throughout the day with a bag attached to the outer end of the catheter to collect the fluid. In the mid-sixties, it was discovered that these in-dwelling catheters caused bacterial infections which often resulted in the death of these children in infancy or early childhood. Sterile catheterization then became the procedure of choice, similar to CIC but involving sterile equipment and a sterile environment. *Tokarcik v. Forest Hills School District*, No. 79-388, slip op. 4-5 (W.D. Pa., Oct. 31, 1980); *Tatro* III at 974. In recent years, CIC has become the universally preferred procedure for children with spina bifida. CIC is done by a lay person in only a few minutes and without the need for special equipment or a sterile environment. This Court's words in *Southeastern* are particularly pertinent:

> Technological advances . . . may enable attainment of these goals [rehabilitating and employing the handicapped] without imposing undue financial and administrative burdens upon a [recipient]. Thus, situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory. *Id.* at 412-413.

Moreover, the non-discrimination requirement of Section 504 mandates that recipients not operate federally assisted programs in such a way as to perpetuate the stigma which the handicapped have historically suf-

fered. Note, "Accommodating the Handicapped: Rehabilitating Section 504 After *Southeastern*," 80 Colum. L. Rev. 171, 175 (1980); *Strathie v. Department of Transportation, supra* at 231; *New York State ARC v. Carey*, 612 F.2d 644, 651 (2d Cir. 1979) (isolation in special classes of retarded children with Hepatitis-B violates Section 504). Thus, the regulations also require that services be provided which

> afford the handicapped persons equal opportunity . . . to gain the same benefit . . . in the most integrated setting appropriate to the person's needs. 34 C.F.R. Section 104.4(b)(2) (1983).

This is Section 504's analogue to the EAHCA's mainstreaming requirement.

The District's treatment of Amber in this case presents a classic example of the second class treatment of the handicapped. If Amber receives CIC services from the District, she can attend a regular education program. If she does not, the benefits of the District's program will be available to her only in a placement limited to handicapped youngsters (or, if homebound instruction is offered, isolated from any other youngsters at all). Such stigmatizing and disadvantageous treatment, completely lacking in any reasonable basis, runs clearly counter to the mandate of Section 504.[10]

---

10. The District argues that Section 504 provides no protection to handicapped public school students, the EAHCA having preempted this field in its entirety. Such a conclusion is rebutted by the legislative history of Section 504 and the EAHCA.

In 1974, Congress amended the definition of "handicapped individual" as applied to Section 504 for the express purpose of clarifying its application to, *inter alia*, public school students. P.L. 93-516, 29 U.S.C. Section 706(6); S. Rep. No. 93-1297, 93rd Cong. 2d Sess. 30 (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373, 6388-89 (see, footnote 8, p. 21, *supra*). In the same report, the Committee noted that the EACHA was in its final stages of passage. *Id.* at 6408. Congress would hardly have amended the Rehabilitation Act to insure inclusion of handicapped public school students if it

CONCLUSION

For the above-cited reasons, the decision of the United States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

JANET F. STOTLAND
Education Law Center, Inc.
2100 Lewis Tower Building
225 S. 15th Street
Philadelphia, PA 19102
(215) 732-6655
Counsel for Amici Curiae
Counsel of Record

March 22, 1984

---

immediately intended again to remove that group from the Act's coverage with passage of the EAHCA. See also, the legislative history of the EAHCA at S. Rep. No. 94-168, 94th Cong. 1st Sess. 12, 26 (1975), *reprinted in* 1975 U.S. Code Cong. & Adm. News 1425, 1436, 1451-1452; *Georgia Association for Retarded Citizens v. McDaniel*, 716 F.2d 1565, 1579 (11th Cir. 1983) (discussion, *inter alia*, of the differences in the two statutes as grounds for rejecting the preemption argument).